

## IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No.

(Leave blank.)

Plaintiff-Appellee,

Court of Appeals No. 333872  
(From Court of Appeals

V

decision.)

LOVELL CHARLES SHARPE,Trial Court No. 16-001606-01-FC(Print the name you were convicted under on this line.)  
Report.)

(See Court of Appeals brief or Presentence Investigation

Defendant-Appellant.

**INSTRUCTIONS:** Answer each question. Add more pages if you need more space. You MUST send a copy of the Court of Appeals decision. Your application must be RECEIVED by the Supreme Court no more than 56 days from the date stamped on the Court of Appeals decision.

## (DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL

- INTERLOCUTORY APPEAL -

1. I was found guilty on (Date of Plea or Verdict) \_\_\_\_\_.

2. I was convicted of (Name of offense) \_\_\_\_\_

COA DECISION: 3/16/17

3. I had a ☐ guilty plea; ☐ no contest plea; ☐ jury trial; ☐ trial by judge. (Mark one that applies.)4. I was sentenced by Judge CASE PENDING BEFORE SHANNON WALKER on \_\_\_\_\_  
(Print or type name of judge) (Print or type date you were sentenced)in the WAYNE CO. County Circuit Court to \_\_\_\_\_ years \_\_\_\_\_ months  
(Name of county where you were sentenced; put Recorder's Court for crimes in Detroit) (Print or type minimum sentence here)to \_\_\_\_\_ years \_\_\_\_\_ months, and \_\_\_\_\_ years \_\_\_\_\_ months to \_\_\_\_\_ years \_\_\_\_\_ months.  
(maximum sentence) (minimum sentence) (maximum sentence)I am in prison at the WAYNE CO. JAIL DETROIT,  
FRANK MURPHY in WAYNE CO., Michigan.  
(Print or type name of prison) (Print or type city where prison is located.)5. The Court of Appeals affirmed my conviction on 3/16/17 in  
DECISION (Print or type date stamped on Court of Appeals decision)in case number 333872 A copy of that decision is attached.  
(Print or type number on Court of Appeals decision)6. ☐ This application is filed on time. (Check if filing within 21 days of date on Court of Appeals decision.)☒ This application is filed late. (Check if filing more than 21 days but within 56 days of Court of Appeals decision.)

This application is late because: (Check all the reasons that apply. You can add others.)

☐ I had to find help.☐ I could not get postage and supplies to file this application.

- ☐ I am not experienced or educated in the law.  
☐ I did not receive my decision from my attorney in time.  
☐ Other. Explain \_\_\_\_\_

**(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.**

\_\_\_\_\_, Defendant-Appellant CA No. \_\_\_\_\_

**INSTRUCTIONS:** In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 which starts on page 7.

**GROUND - ISSUES RAISED IN COURT OF APPEALS**

7. I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below.

**ISSUE I:**

- A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

- B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.  
☒ 2. The issue raises a legal principle which is very important to Michigan law.  
☒ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.  
☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

- C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

IRRELEVANT, INFLAMMATORY AND  
 PREJUDICIAL EVIDENCE WILL  
 BE ADMITTED

**(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)**

\_\_\_\_\_, Defendant-Appellant CA No. \_\_\_\_\_

**INSTRUCTIONS:** In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 which starts on page 7.

**ISSUE II:**

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)**

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☐ 2. The issue raises a legal principle which is very important to Michigan law.
- ☐ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

[illegible]

## (DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

\_\_\_\_\_, Defendant-Appellant CA No. \_\_\_\_\_

**INSTRUCTIONS:** In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 which starts on page 7.

**ISSUE III:**

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

---



---



---



---

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☐ 2. The issue raises a legal principle which is very important to Michigan law.
- ☐ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

---



---



---



---



---



---



---



---



---



---

**(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.**

\_\_\_\_\_, Defendant-Appellant

CA No. \_\_\_\_\_

**INSTRUCTIONS:** In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 which starts on page 7.

**ISSUE IV:**

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

---



---



---



---

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☐ 2. The issue raises a legal principle which is very important to Michigan law.
- ☐ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---

**(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.**

\_\_\_\_\_, Defendant-Appellant

CA No. \_\_\_\_\_

**INSTRUCTIONS:** In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 which starts on page 7.

**ISSUE V:**

**A.** (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

---



---



---



---

**B.** The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

- ☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.
- ☐ 2. The issue raises a legal principle which is very important to Michigan law.
- ☐ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
- ☐ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

**C.** (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---

**FOR MORE ISSUES, ADD PAGES. GIVE THE SAME INFORMATION. NUMBER EACH ISSUE.**



**(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.**

\_\_\_\_\_, Defendant-Appellant                      CA No. \_\_\_\_\_

**INSTRUCTIONS:** If you want the Supreme Court to look at errors which were never raised in the Court of Appeals by your attorney or you, check **YES** in 8 below. Answer parts **A**, **B**, and **C** for each new issue you raise. There is space provided for 2 new issues. You can add more pages. If you do not have new issues go directly to question 9 on page 8.

**GROUND - NEW ISSUES**

8. ☐ **YES**, I want the Court to consider the additional grounds for relief contained in the following issues, which were not raised in my Court of Appeals brief. MCR 7.302(F)(4).

**NEW ISSUE I:**

**A.** (State the new issue you want the Court to consider.) \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**B.** The Court should review this issue because: (Check all the ones you think apply to your case, but you must check at least one.)

☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.

☐ 2. The issue raises a legal principle which is very important to Michigan law.

**C.** (Explain why you think that your choices in B above apply to this issue in your case. List any cases and citations, laws, or court rules, etc. which support your argument. Explain how they apply to this issue. State the facts which support and explain this issue. If these facts were not presented in court, explain why. You can add more pages.)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)**

\_\_\_\_\_, Defendant-Appellant

CA No. \_\_\_\_\_

**NEW ISSUE II:**A. (State the new issue you want the Court to consider.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

B. The Court should review this issue because: (Check all the ones you think apply to your case, but you must check at least one.)

☐ 1. The issue raises a serious question about the legality of a law passed by the legislature.☐ 2. The issue raises a legal principle which is very important to Michigan law.C. (Explain why you think that your choices in B above apply to this issue in your case. List any cases and citations, laws, or court rules, etc. which support your argument. Explain how they apply to this issue. State the facts which support and explain this issue. If these facts were not presented in court, explain why. You can add more pages.)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_**RELIEF REQUESTED**

9. For the above reasons I request that this Court GRANT leave to appeal, APPOINT a lawyer to represent me, and GRANT any other relief it decides I am entitled to receive.

x 5-4-17  
(Date)  
x Lovell Sharpe  
(Print your name and number here.)  
2016002945x Lovell Sharpe  
(Sign your name here.)  
x 570 Chinton St.  
(Print your address here.)



## IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No. \_\_\_\_\_  
(Leave blank.)

Plaintiff-Appellee,

Court of Appeals No. 333812  
(From Court of Appeals decision.)v  
LOVELL CHARLES SHARPE  
(Print the name you were convicted under on this line.)Trial Court No. 16-00606-01-FC  
(See Court of Appeals brief or Presentence Investigation Report.)

Defendant-Appellant.

## AFFIDAVIT OF INDIGENCY

1. My name is LOVELL C. SHARPE. I am in prison at WAYNE CO. JAIL in  
(Type or print your name here.) (Name of prison)WAYNE CO. JAIL Michigan. My prison number is 2016-2945. My income and assets are:  
(City where prison is located.) (your prison number.) (Check the ones that apply to you.)☐  
☒  
☐  
☐My only source of income is from my prison job.  
I have no income.  
I have no assets.  
I can not pay the filing fees for the attached application.

I ask this Court to waive the filing fee in this matter.

I declare that the statements above are true to the best of my knowledge, information and belief.

\* 5-4-17  
(Date)\* Lovell Sharpe  
(Sign your name here.)  
\* Lovell Sharpe  
(Print your name here.)

## PROOF OF SERVICE

On \_\_\_\_\_, 200 \_\_, I mailed by U.S. mail one copy of the documents checked below: (Put a check mark by the ones you mailed.)

- ☐
- Affidavit of Indigency and Proof of Service
- 
- ☐
- (Delayed) Pro Per Application for Leave to Appeal with a copy of Court of Appeals Decision
- 
- ☐
- Court of Appeals Brief
- 
- ☐
- Supplemental Court of Appeals Brief

TO: \_\_\_\_\_ County Prosecutor, \_\_\_\_\_, at  
(Name or county where you were sentenced) (Address)  
\_\_\_\_\_, MI \_\_\_\_\_  
(City) (Zip Code)

I declare that the statements above are true to the best of my knowledge, information and belief.

\_\_\_\_\_  
(Date)\_\_\_\_\_  
(Sign your name here.)\_\_\_\_\_  
(Print your name here.)

## COVER LETTER

(Put Today's Date)

Clerk  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

RE: People v Lovell Sharpe R  
here.)

(Print or type the name you were convicted under

Supreme Court No. \_\_\_\_\_

(Leave blank - the Clerk will assign a number for you.)

Court of Appeals No. 333972

(Get this number from the Court of Appeals decision.)

Trial Court No. 16-001606-01-FC(Get this number from Court of Appeals brief or  
Presentence Investigation Report.)

Dear Clerk:

Enclosed please find the original of the pleadings checked below. (Put a check mark by the items you are sending.) I am indigent and can not provide seven copies. Please file them.

- ☒ Affidavit of Indigency/Proof of Service  
☒ (Delayed) Pro Per Application for Leave to Appeal  
☒ Court of Appeals Decision (You must enclose a copy of the Court of Appeals decision.)  
☒ Court of Appeals Brief (This is not necessary, but it is a good idea.)  
☐ Supplemental Court of Appeals Brief (This is not necessary, but it is a good idea.)  
☐ Other \_\_\_\_\_

Thank you.

Sincerely,

Lovell Sharpe  
(Sign your name here.)

Lovell Sharpe  
(Print or type your name here.)

2016002945  
(Print or type your prisoner number here.)

570 CLINTON  
(Print or type your address here.)

Det. Mich. 48226  
(Print or type your City, State, and Zip Code here.)

## INSTRUCTIONS

1. You will need 2 copies and the original of this letter and the pleadings listed above.
2. Mail the original of this letter and all the pleadings listed above to the Supreme Court Court Clerk.
3. Mail 1 copy of letter and pleadings to the prosecutor in the county where you were convicted.
4. Keep 1 copy of letter and pleadings for your file.

Copy sent to:

County Prosecutor

(Fill in the county where you were convicted.)

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LOVELL CHARLES SHARPE,

Defendant-Appellee.

---

FOR PUBLICATION

March 16, 2017

9:00 a.m.

No. 332879

Wayne Circuit Court

LC No. 16-001606-01-FC

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOVELL CHARLES SHARPE,

Defendant-Appellant.

---

No. 333872

Wayne Circuit Court

LC No. 16-001606-01-FC

Before: RIORDAN, P.J., and METER and FORT HOOD, JJ.

RIORDAN, J.

In these consolidated appeals, the trial court issued an order<sup>1</sup> granting in part and denying in part the prosecution's motion to admit evidence concerning a criminal sexual conduct victim's pregnancy, abortion, and lack of other sexual partners. In its ruling, the court held that references to the complainant's abortion and lack of other sexual partners were inadmissible, but references to the complainant's pregnancy were admissible.

---

<sup>1</sup> The parties agree that the trial court issued two orders with regard to the prosecution's motion, but the court intended for the parties to rely on the more detailed order, which consists of the court's entire ruling.

In Docket No. 332879, the prosecution filed an application for leave to appeal, seeking to challenge the trial court's order to the extent that the prosecution's motion was denied. In Docket No. 333872, defendant filed a delayed application for leave to appeal, seeking to challenge the order to the extent that the prosecution's motion was granted. We granted both applications and consolidated the appeals.<sup>2</sup> We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

### I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises from several incidents of criminal sexual conduct that defendant allegedly committed against the complainant, DM, when she was 13 or 14 years old. Defendant has been charged with first-degree criminal sexual conduct, MCL 750.520b; third-degree criminal sexual conduct, MCL 750.520d(1)(a); and fourth-degree criminal sexual conduct, MCL 750.520e.

At the preliminary examination, the complainant described two incidents of abuse by defendant that allegedly occurred in late 2013 or 2014. Defendant was previously in a relationship with DM's mother, and he fathered two of DM's half-siblings. The first incident occurred when defendant stayed with DM and her siblings while DM's mother was hospitalized. DM alleged that defendant made sexual contact with her, consisting of vaginal penetration as well as other touching. A second incident of abuse allegedly occurred at defendant's home, which, again, included vaginal penetration, among other things.

In October 2014, DM went to Henry Ford Hospital after her mother received a letter indicating that DM had an abnormal test result and needed to see the doctor again. At that time, DM underwent a pregnancy test, which came back positive. DM had not been showing any signs of pregnancy, and she and her mother were unaware that she was pregnant before they received the test results. Before she went to the hospital, DM was unaware of how a woman became pregnant, and Henry Ford staff had to explain the process to her.

DM's mother told defendant about the pregnancy, and they agreed that DM needed to get an abortion. Defendant gave DM's mother money to pay for half the cost of the abortion, with no expectation of repayment. DM then underwent an abortion on November 2014.

For several months, DM refused to tell her mother how she became pregnant. In April 2015, after ending her relationship with defendant, DM's mother again asked DM how she had become pregnant. DM then disclosed defendant's alleged sexual abuse.

At the preliminary examination, DM testified that she did not have any boyfriends during the year that she was 14, and no one else had penetrated her. DM's mother provided similar testimony, stating that she had no reason to believe that DM was sexually active with anyone other than defendant.

---

<sup>2</sup> *People v Sharpe*, unpublished order of the Court of Appeals, entered September 2, 2016 (Docket Nos. 332879 and 333872).

After defendant was bound over for trial, the prosecution filed a request to pierce the rape shield at trial. The prosecution first requested that the trial court admit evidence that defendant was the only person with whom DM had sexual contact between the incidents giving rise to defendant's charges and her abortion. The prosecution argued that this would corroborate DM's account of the sexual assault, and help the jury to decide whether defendant penetrated and impregnated her, and that the evidence would be admissible under the exceptions in MCL 750.520j and MRE 404(a)(3) as evidence regarding the source or origin of semen, pregnancy, or disease. The defense argued that evidence concerning DM's virginity is inadmissible under *People v Bone*, 230 Mich App 699; 584 NW2d 760 (1998), and that the evidence of her pregnancy and abortion is not relevant. Rather, it contended, the evidence regarding DM's virginity, pregnancy, and abortion is extremely prejudicial. Accordingly, defendant asked the court to preclude any mention of DM's virginity, pregnancy, and abortion at trial.

The court initially ruled:

Well I know from my experience that the issue in this particular case is gonna be the credibility of the witness. In this particular case, we're dealing with a 14-year-old teenager.

It would be helpful to have the DNA from the aborted fetus. Because if we had that DNA, what if that DNA didn't come back to the defendant? Then that would mean that possibly she was having consensual sex maybe with someone her own age. We don't know. And we won't know because the fetus was not preserved for DNA purposes.

So I have to agree with the defense that the prejudicial nature of the proposed evidence outweighs the probative value in this case, and I'm not gonna allow it.

Later in the hearing, the court provided clarification of its ruling:

For clarity, for the record, I will allow the prosecutor to ask the complainant whether or not she got pregnant during the time that she was allegedly sexually active with the defendant. However, I will not allow evidence in regards to the abortion or her sexual intercourse with no other partners.

\* \* \*

The Court's gonna preclude evidence and argument in regard to the abortion and other sexual partners or lack of prior sexual activity by the complainant, and that's pursuant to MRE 404(a)3 [sic].

Consistent with its ruling on the record, the trial court entered an order granting the prosecution's motion in part by allowing evidence of DM's pregnancy and denying the motion in part by excluding evidence of DM's abortion and lack of other sexual partners.

## II. STANDARD OF REVIEW

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs if the trial court's decision "is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). In general, there is no abuse of discretion when the trial court's decision involves a close evidentiary question. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). "When the decision involves a preliminary question of law, . . . such as whether a rule of evidence precludes admission, we review the question de novo." *Mardlin*, 478 Mich at 614.

The rules of statutory construction apply equally to the construction of court rules. *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009).

When construing a statute, our primary goal is to ascertain and give effect to the intent of the Legislature. To do so, we begin by examining the language of the statute. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and the statute is enforced as written. Stated differently, a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. [*People v Phillips*, 469 Mich 390, 395; 666 NW2d 65 (2003) (quotation marks and citations omitted).]

### III. LEGAL BACKGROUND

These consolidated appeals implicate the same statute and court rule. MRE 404(a)(3) provides:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

\* \* \*

(3) *Character of alleged victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity, showing the source or origin of semen, pregnancy, or disease[.]

Similarly, MCL 750.520j, known as the rape-shield statute, states:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:



(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

The evidentiary rule differs from the statute in that the court rule generally addresses the admission of *character* evidence while the statute deals with the admission of evidence dealing with instances of a victim's sexual *conduct*. Compare MRE 404(a)(3) with MCL 750.520j. However, MCL 750.520j and MRE 404(a)(3) permit the same types of evidence: (1) evidence of the victim's past sexual conduct with the "actor," under MCL 750.520j, or "the defendant," under MRE 404(a)(3), and (2) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. The second exception is not limited to sexual activity with the defendant. Instead, it encompasses evidence of sexual activity, even if unrelated to the defendant, if that sexual activity shows the source or origin of semen, pregnancy, or disease.

"The rape-shield law, with certain specific exceptions, was designed to exclude evidence of the victim's sexual conduct with persons *other than defendant*." *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982) (emphasis added). As we explained in *People v Duenaz*, 306 Mich App 85, 92; 854 NW2d 531 (2014):

The [rape shield] statute was enacted to prohibit inquiry into a victim's prior sexual encounters, which were historically used by defendants charged with CSC involving an adult in an effort to prove the defense of consent. The statute reflects a legislative policy determination that sexual conduct or reputation regarding sexual conduct as evidence of character and for impeachment, while perhaps logically relevant, is not legally relevant. Although consent is not a relevant defense to a CSC charge involving an underage minor, Michigan courts have applied the rape-shield statute in cases involving child victims. [Citations omitted.]

However, the statute does not bar "testimony regarding sexual subjects involving the complainant" if "such testimony falls outside the scope of the statute." *People v Ivers*, 459 Mich 320, 328; 587 NW2d 10 (1998).

IV. DOCKET NO. 333872

Defendant contends that the trial court abused its discretion by ruling that the prosecution could elicit testimony from DM that she had become pregnant as a result of the sexual assault perpetrated by defendant. We disagree.

Under MRE 402, “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, [the Rules of Evidence], or other rules adopted by the Supreme Court.” Defendant contends that “[e]vidence regarding complainant’s pregnancy is barred by MRE 404(a)(3) as evidence of the victim’s ‘past sexual conduct’ ” under *Bone*, 230 Mich App 699. Defendant also argues that if evidence of the victim’s pregnancy is admitted without DNA or forensic evidence that he caused the pregnancy, he “will suffer from the unfair appeal to the jurors’ sense that complainant should be believed and that she is deserving of additional sympathy.” The prosecution, however, contends that evidence that the victim became pregnant while she was sexually active with defendant is admissible under MRE 404(a)(3), which allows the admission of evidence concerning specific instances of sexual activity showing the source of pregnancy.

The trial court correctly determined that evidence regarding the complainant’s pregnancy was admissible. In analyzing this issue, the parties focus on MRE 404(a)(3). MRE 404(a) pertains to “[e]vidence of a person’s character or trait” to prove “action in conformity therewith on a particular occasion . . . .” In general, under MRE 404(a), evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity with that character on a particular occasion. *Bone*, 230 Mich App at 701. In a prosecution for criminal sexual conduct, evidence of the victim’s past sexual conduct with the defendant and evidence of specific instances of sexual activity are admissible to show the source of semen, pregnancy, or disease. MRE 404(a)(3); *Bone*, 230 Mich App at 702. Here, however, the prosecutor did not seek to introduce evidence of the victim’s pregnancy to prove that she acted in conformity with that character when the incidents allegedly occurred. See MRE 404(a)(3). Stated differently, the prosecution did not seek the admission of the evidence related to the pregnancy to show that DM had a particular character trait, in accordance with which she acted during the alleged instances of sexual conduct. Thus, because the complainant’s pregnancy is not character evidence, and is not being offered to prove that the complainant “acted in conformity therewith,” it is not precluded by MRE 404(a).

The trial court properly concluded that the prosecution could present evidence of the complainant’s pregnancy because such evidence is not prohibited under MCL 750.520j(1). Again, unless otherwise precluded, “[a]ll relevant evidence is admissible.” MRE 402. Relatedly, “the touchstone of the rape-shield statute is relevance. In providing two narrow exceptions to the exclusionary rule, the Legislature premised both exceptions on the threshold determination that the proposed evidence is ‘material to a fact at issue.’ ” *People v Adair*, 452 Mich 473, 482; 550 NW2d 505 (1996), quoting MCL 750.520j(1). The record clearly shows that the pregnancy is relevant to corroborate DM’s account of vaginal penetration. See MRE 401 (defining relevance); *People v Borowski*, 330 Mich 120, 125-126; 47 NW2d 42 (1951) (stating that evidence that the complainant became pregnant and gave birth was admissible as evidence of intercourse). The evidence also is relevant under the facts of this case to explain DM’s delay in reporting defendant’s alleged sexual assault. She did not disclose the sexual assault until after she was found to be pregnant and later questioned by her mother regarding the source of the pregnancy. While evidence of the pregnancy falls within the categories of excluded evidence

under the statute as evidence of a specific instance of the victim's sexual conduct, it is clearly admissible under the statutory exception for "[e]vidence of the victim's past sexual conduct with the actor."<sup>3</sup> MCL 750.520j(1).

We reject defendant's claim that the pregnancy-related evidence is inadmissible because it is impermissibly prejudicial under MCL 750.520j based on the fact that there is no alternative DNA or other forensic evidence available to show parentage. A trial court must exclude evidence that is material to a fact in issue and that otherwise fulfills the requirements under the rape-shield statute if the "inflammatory or prejudicial nature" of the evidence "outweigh[s] its probative value." MCL 750.520j(1).<sup>4</sup> Defendant mischaracterizes the probative and prejudicial value of the evidence at issue. A positive pregnancy test is highly probative because it provides objective proof that corroborates the complainant's claims that she was vaginally penetrated by defendant. With the evidence of the pregnancy, the proof of defendant's guilt rests on more than a one-on-one credibility contest. We fail to see how this evidence is unduly prejudicial for the reasons that defendant states. Further, as discussed later in this opinion, DM's testimony that defendant was the only person with whom she had sexual contact is admissible and has the same type of probative indicia as would DNA or forensic evidence from the aborted child.

Thus, the trial court properly admitted evidence of DM's pregnancy, regardless of the lack of DNA or other forensic evidence that defendant was the father of the child.

#### V. DOCKET NO. 332879

The prosecution argues that the trial court abused its discretion when it ruled that the prosecution could not elicit testimony from DM that her only sexual contact was with defendant and evidence concerning her abortion. We agree.

#### A. OTHER SEXUAL PARTNERS

The trial court relied on MRE 404(a) in excluding evidence of DM's lack of other sexual partners. Again, under MRE 404(a), evidence of a person's character or trait of character is generally inadmissible for the purpose of proving action in conformity with that character on a

<sup>3</sup> For the reasons discussed later in this opinion, we conclude that the victim's testimony that her only sexual contact was with defendant is admissible. Thus, evidence of her pregnancy constitutes "[e]vidence of the victim's past sexual conduct with the actor." MCL 750.520j(1)(a).

<sup>4</sup> The standard for excluding evidence on the basis of prejudice is more stringent under MCL 750.520j than under MRE 403, which provides, "Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added.) See *Adair*, 452 Mich at 481 (comparing the prejudice-related inquiry under MRE 403 and MCL 750.520j(1) and recognizing that the rape-shield statute reflects the same "evidentiary postulate, but with a significant modification").

particular occasion. However, in a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity are admissible to show the source of semen, pregnancy, or disease. MRE 404(a)(3); *Bone*, 230 Mich App at 701-702. In *Bone*, 230 Mich App at 702-704, this Court held that the defendant's right to a fair trial was violated by the prosecutor's repeated references to the complainant's virginity as circumstantial proof that the victim did not consent to the sexual conduct at issue. Specifically, the *Bone* Court held, "We interpret MRE 404(a)(3) to preclude the use of evidence of a victim's virginity as circumstantial proof of the victim's current unwillingness to consent to a particular sexual act." *Bone*, 230 Mich App at 702 (footnotes omitted). However, it is significant that the Court noted, immediately after stating its interpretation of the court rule, that "evidence introduced for some other relevant purpose does not become inadmissible merely because it tends to show that the victim was a virgin." *Bone*, 230 Mich App at 702 n 3. It is axiomatic that evidence that is inadmissible for one purpose may nonetheless be admissible for another purpose. *Sabin*, 463 Mich at 56.

Here, the prosecution did not seek to introduce evidence of the complainant's lack of sexual activity with men other than defendant to prove that the victim acted in conformity with that character when the incidents of defendant's abuse allegedly occurred. See MRE 404(a)(3). For example, the prosecution did not request admission of the evidence to show that the complainant's previous virginity supported an alleged lack of consent,<sup>5</sup> or that she regularly got pregnant and then had abortions. Instead, the prosecutor sought admission of evidence concerning the victim's lack of other sexual partners to substantiate her claim, and prove by the process of elimination, that she was, in fact, sexually penetrated and impregnated by defendant. Accordingly, the evidence concerning the complainant's virginity was outside the scope of prohibited evidence under MRE 404(a)(3) given its purpose for admission, and the trial court erred in relying on MRE 404(a)(3) as a basis for excluding the evidence.<sup>6</sup>

Further, this evidence is not prohibited under MCL 750.520j(1). The plain statutory language does not bar evidence concerning a victim's *lack* of specific instances of sexual conduct.<sup>7</sup> See *Phillips*, 469 Mich at 395. Nevertheless, even if evidence of DM's virginity arguably refers to "specific instances of the victim's sexual conduct," by essentially constituting the inverse of sexual activity, the statute permits "[e]vidence of specific instances of sexual activity showing the origin of . . . pregnancy." MCL 750.520j(1). "Again, the touchstone of the

<sup>5</sup> Consent is not an issue in this case given the victim's age. See MCL 750.520b(1)(b); MCL 750.520d(1)(a); MCL 750.520e(1)(a).

<sup>6</sup> Even if the proposed testimony was within the scope of MRE 404(a)(3), the evidence is being offered for a proper purpose for admission under both MRE 404(a)(3) and MCL 750.520j(1) as "evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease[.]" Accordingly, the subsequent analysis concerning MCL 750.520j would be equally applicable if the evidence falls within the scope of MRE 404(a)(3).

<sup>7</sup> Notably, *Bone*, 230 Mich App at 701-704, was decided under MRE 404(a)(3), not MCL 750.520j.



rape-shield statute is relevance. In providing two narrow exceptions to the exclusionary rule, the Legislature premised both exceptions on the threshold determination that the proposed evidence is 'material to a fact at issue.' " *Adair*, 452 Mich at 482, quoting MCL 750.520j(1). As previously discussed, the trial court properly ruled that evidence of DM's pregnancy is admissible at trial.

Given the evidence of DM's pregnancy, her insistence that she never had sexual relations with anyone except defendant is highly relevant to her claim that defendant vaginally penetrated and impregnated her and, accordingly, committed the charged offenses. Since MCL 750.520j(1)(b) permits evidence of specific instances of sexual activity to show the origin of a complainant's pregnancy, it is only reasonable to conclude that DM should be permitted to testify, consistent with her claim that defendant was the person whose sexual activity was the "origin" of her pregnancy, that there is no other possible source or "origin" given the fact that no one but defendant sexually penetrated her.

Additionally, this evidence is not inadmissible based on its potentially inflammatory or prejudicial effect. See MRE 403; MCL 750.520j(1). The objective evidence of DM's pregnancy and evidence of DM's lack of sexual partners is highly probative to the issue of whether defendant did, in fact, vaginally penetrate the victim. See *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995) (discussing the probative value of evidence). Moreover, since the testimony at issue is DM's *lack* of sexual partners, there is, at most, minimal prejudice associated with the admission of this testimony, especially given the purpose of the rape-shield statute, see *Adair*, 452 Mich at 480; *Arenda*, 416 Mich at 10, and the purpose of the evidence in this case, cf. *Bone*, 230 Mich App at 703-704. Under the circumstances of the instant case, the evidence only is prejudicial to the extent that this evidence makes more likely the fact that defendant actually committed the offenses, and "[r]elevant evidence is inherently prejudicial . . . ." *Mills*, 450 Mich at 75. We find no basis for concluding that the evidence would have an inflammatory or prejudicial effect that would outweigh its probative value. See MRE 403; MCL 750.520j.

Therefore, the trial court's refusal to allow the prosecutor to question the complainant regarding whether she had sexual relations with anyone other than defendant was outside the range of reasonable and principled outcomes. See *Orr*, 275 Mich App at 588-589; cf. *Bone*, 230 Mich App at 702-704, 702 n 3.<sup>8</sup>

---

<sup>8</sup> We find persuasive the reasoning in *State v Stanton*, 319 NC 180, 187; 353 SE2d 385 (1987), which considered evidence strikingly similar to that at issue in this case:

Defendant contends that the admission of this evidence [indicating that the victim was not dating or having sexual intercourse with anyone else on a regular basis at the time of the rape] somehow violates Rule 412. With certain exceptions not pertinent here, Rule 412 is the embodiment of its predecessor, N.C.G.S. § 8-58.6 (repealed by 1983 N.C.Sess.Laws (Regular Sess.1984) ch. 1037, § 2 (effective 1 July 1984)), a part of what was commonly referred to as the Rape Shield Law.

## B. ABORTION EVIDENCE

We also agree with the prosecution that the trial court erred when it concluded that the prosecution may not present at trial any evidence of the complainant's abortion.

Again, all relevant evidence is admissible unless it is otherwise prohibited by the Rules of Evidence or other law. MRE 402. The trial court erroneously concluded that evidence of the abortion was barred by MRE 404(a)(3). The circumstances surrounding the victim's abortion are not character evidence, and are not being offered to prove action in conformity with DM's character. While evidence of the abortion would constitute "[e]vidence of specific instances of the victim's sexual conduct" prohibited under MCL 750.520j(1),<sup>9</sup> it falls within the exception for evidence of the victim's past sexual conduct with the actor under MCL 750.520j(1)(a) by providing further objective evidence that DM was, in fact, pregnant, which necessarily resulted from defendant's alleged vaginal penetration of her.

Contrary to defendant's claims, the record shows that evidence regarding DM's abortion is highly relevant to the charges against him, especially in the context of this case. See MRE 401; MRE 402. Evidence of DM's pregnancy and the subsequent abortion are directly probative of a material fact at issue, *i.e.*, whether defendant engaged in an act of sexual penetration with the complainant. See MCL 750.520b(1)(b); MCL 750.520d(1)(a). We are persuaded by the court's reasoning in *State v Stanton*, 319 NC 180, 186; 353 SE2d 385 (1987), in holding that the trial court did not abuse its discretion in admitting evidence of the complainant's pregnancy and abortion: "[The victim's] simple statement that she had an abortion served the purpose of corroborating both the fact of penetration and the fact of her pregnancy." Evidence of DM's abortion is also significant in this case given her mother's testimony that defendant paid for half of the abortion, and that he had no expectation of repayment.<sup>10</sup> A jury could reasonably infer,

---

Defendant's failure to object at trial aside, we find no error in the admission of this evidence. Defendant cites no authority contrary to either Rule 412 or its predecessor statute, N.C.G.S. § 8-58.6, to prohibit a victim from willingly testifying as to the lack of sexual involvement for purposes of corroboration, and we decline to so construe it. It would strain credulity for this Court to hold that, while a victim may testify to the details of her rape and corroborate that testimony with further testimony concerning her pregnancy and subsequent abortion, she may not testify as to the lack of sexual involvement with anyone except the defendant and thereby fail to fix responsibility for the pregnancy on the defendant.

<sup>9</sup> Cf. *Commonwealth v Weber*, 549 Pa 430, 437; 701 A2d 531 (1997) ("The Rape Shield Law applies to evidence concerning a victim's abortion because it necessarily implicates past sexual conduct."); *Razo v State*, 431 NE2d 550, 554-555 (Ind Ct App, 1982) (stating, with regard to a now-repealed rape shield statute, that "[a] pregnancy which has been aborted can only be the result of 'past sexual conduct' ") (footnote omitted).

<sup>10</sup> Although defendant's statements themselves were not admitted through the testimony of DM's mother at the preliminary examination, defendant's statements regarding the abortion would be



from defendant's financial contribution, a consciousness of guilt, or a desire to dispose of the "evidence" because the child's birth could lead to the conclusion that he committed the sexual assault that caused the pregnancy. Cf. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008) ("A rational jury could have also inferred defendant's consciousness of guilt from evidence that defendant wished to have the victim's body immediately cremated. Defendant's desire to have the body cremated could be viewed as an effort to destroy evidence of the crime of murder, thereby showing a consciousness of guilt.").<sup>11</sup>

Because of its significant probative value, we disagree that evidence concerning the victim's abortion is inadmissible because it would be impermissibly prejudicial or it would improperly appeal to the jury's sympathy. See MCL 750.520j(1) (stating that evidence permitted under the statute may only be admitted if "its inflammatory or prejudicial nature does not outweigh its probative value."). Given the widespread and unfortunate acceptance of abortion in today's society, we again are persuaded by the court's reasoning in *Stanton*, 319 NC at 186: "The mere fact that an abortion took place is not so inflammatory as to render it inadmissible." Likewise, there is no basis for concluding that the fact that an abortion took place will appeal to a jury's sympathies.

Therefore, given the high probative value of the evidence, the trial court's exclusion of evidence related to DM's abortion was outside the range of principled outcomes. See *Orr*, 275 Mich App at 588-589.

## VI. CONCLUSION

All of the evidence proffered by the prosecution is admissible. The trial court erred in holding otherwise and shall permit the admission of this evidence at defendant's trial.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood

---

admissible through her testimony as the statement of a party opponent. MRE 801 (stating that a party's own statement, if offered against the party, is nonhearsay).

<sup>11</sup> We also agree with the prosecution that evidence concerning DM's abortion could be somewhat relevant, given the admission of evidence of DM's pregnancy, to address the lack of conclusive DNA or forensic evidence showing that defendant was the father of the child or fetus related to DM's pregnancy. Although we recognize that a stipulation or jury instruction could easily address this purpose for admission without mentioning the abortion, we believe that the evidence of the abortion is highly relevant for the reasons previously discussed.

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

v

Docket No. 332879

LOVELL CHARLES SHARPE,

Defendant-Appellee.

---

Wayne Circuit Court No. 16-001606-01-FC

---

DEFENDANT-APPELLEE'S BRIEF ON APPEAL  
ORAL ARGUMENT REQUESTED

JONATHAN B.D. SIMON (P35596)  
Attorney for Defendant-Appellee  
P.O. Box 2373  
Birmingham, Michigan 48012-2373  
(248) 433-1980

# TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED. ....	ii
COUNTERSTATEMENT OF APPELLATE JURISDICTION. ....	ii
INDEX OF AUTHORITIES. ....	iii
STATEMENT OF FACTS. ....	1
ARGUMENT:	
THE TRIAL COURT PROPERLY DENIED THE PEOPLE’S REQUEST TO ADMIT IRRELEVANT EVIDENCE THAT COMPLAINANT WAS PREVIOUSLY A VIRGIN AND THAT SHE SUBSEQUENTLY UNDERWENT AN ABORTION WHERE THE INFLAMMATORY OR PREJUDICIAL NATURE OF SUCH EVIDENCE OUTWEIGHS ITS PROBATIVE VALUE. ....	2
RELIEF REQUESTED. ....	7

## COUNTERSTATEMENT OF QUESTION PRESENTED

WHETHER THE TRIAL COURT PROPERLY DENIED THE PEOPLE’S  
REQUEST TO ADMIT IRRELEVANT EVIDENCE THAT COMPLAINANT WAS  
PREVIOUSLY A VIRGIN AND THAT SHE SUBSEQUENTLY UNDERWENT  
AN ABORTION WHERE THE INFLAMMATORY OR PREJUDICIAL NATURE  
OF SUCH EVIDENCE OUTWEIGHS ITS PROBATIVE VALUE.

The Trial Court answered this question "Yes".  
Plaintiff-Appellant answered this question "No".  
Defendant-Appellee answered this question "Yes".

## COUNTERSTATEMENT OF APPELLATE JURISDICTION

Defendant-Appellee accepts Plaintiff-Appellant’s statement of appellate jurisdiction.

## INDEX OF AUTHORITIES

CASE LAW	Page
<u>Beaubien v Cicotte</u> , 12 Mich 459 (1864).....	5
<u>Collins v Beecher</u> , 45 Mich 436; 8 NW 97 (1881). ....	5
<u>People v Adair</u> , 452 Mich 473; 550 NW2d 505 (1996).....	3,4
<u>People v Arenda</u> , 416 Mich 1; 330 NW2d 814 (1982). ....	6
<u>People v Benton</u> , 294 Mich App 191; 817 N.W.2d 599 (2011). ....	4
<u>People v Blackston</u> , 481 Mich 451; 751 NW2d 408 (2008).....	2
<u>People v Bone</u> , 230 Mich App 699; 584 N.W.2d 760 (1998).....	6
<u>People v Brooks</u> , 453 Mich 511; 557 NW2d 106 (1996). ....	4
<u>People v Hackett</u> , 421 Mich 338; 365 NW2d 120 (1984).....	2,3,4,6
<u>People v Ivers</u> , 459 Mich 320; 587 NW 2d 10 (1998).....	3
<u>People v McKinney</u> , 410 Mich 413; 301 NW2d 824 (1981).....	4
<u>People v Mills</u> , 450 Mich 61; 537 NW2d 909 (1995).....	4
<u>People v Stanaway</u> , 446 Mich. 643; 521 NW2d 557 (1994).....	1
<u>People v Stull</u> , 127 Mich App 14; 338 NW2d 403 (1983). ....	6
<u>United States v Dunn</u> , 805 F2d 1275 (CA 6, 1986).....	5
<u>Walker v Engle</u> , 703 F2d 959 (CA 6, 1983). ....	5
CONSTITUTIONS	
US Const, Am V. ....	5
US Const, Am XIV. ....	5
Const 1963, art 1, § 20.....	5

STATUTORY LAW

MCL 750.520j. ....	2,3
--------------------	-----

RULES OF EVIDENCE

FRE 401. ....	5
MRE 401. ....	4,5
MRE 402. ....	4
MRE 403. ....	3,4
MRE 404. ....	2,3,4,6

LEARNED TREATISES

McCormick, Evidence (4th ed). ....	4,5
Wade & Strom, Michigan Courtroom Evidence (rev ed). ....	4
Weinstein & Berger, Evidence. ....	5

OTHER AUTHORITIES

Blacks Law Dictionary. (7th ed.). ....	1
House Legislative Analysis, SB 1207, July 18, 1974. ....	3
MCR 7.212(C)(6).. ....	1

## COUNTERSTATEMENT OF FACTS

Defendant-Appellee Lovell Charles Sharpe (hereinafter "Appellee") generally accepts Plaintiff-Appellant's statement of facts as a clear, concise and chronological narrative, but objects to the extent that they are not fairly stated without argument or bias. See MCR 7.212(C)(6). Appellee further objects to Appellant's repeated reference to the complainant as "the victim". A victim is defined as "a person harmed by a crime, tort, or other wrong." Blacks Law Dictionary. (7th ed.). Labeling the complainant as a "victim" presupposes that there has been a "crime, tort, or other wrong" and implies guilt. Ultimately, the legal status of an accuser as the "victim" is not obtained until a conviction is entered. People v Stanaway, 446 Mich. 643, 678, fn 37; 521 NW2d 557 (1994).



## ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE PEOPLE'S REQUEST TO ADMIT IRRELEVANT EVIDENCE THAT COMPLAINANT WAS PREVIOUSLY A VIRGIN AND THAT SHE SUBSEQUENTLY UNDERWENT AN ABORTION WHERE THE INFLAMMATORY OR PREJUDICIAL NATURE OF SUCH EVIDENCE OUTWEIGHS ITS PROBATIVE VALUE.

### Standard of Review

An abuse of discretion standard applies to a trial court's decision concerning whether to admit evidence under an exception to a rape shield law. People v Hackett, 421 Mich 338; 365 NW2d 120 (1984). An abuse of discretion occurs when the decision falls outside the range of reasonable and principled outcomes. People v Blackston, 481 Mich 451, 460; 751 NW2d 408 (2008).

### Discussion

Michigan's "rape shield" law, MCL 750.520j, in pertinent part, provides:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. Id.

Likewise, MRE 404(a)(3), in part, provides:

(a) Character Evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(3) Character of Victim of Sexual Conduct Crime. In a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and

evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. . . . Id.

The purpose of the legislative enactment of Michigan's rape shield statute was explained by the Michigan Supreme Court in People v Adair, 452 Mich 473, 480-481; 550 NW2d 505 (1996):

The rape-shield statute was aimed at thwarting the then-existing practice of impeaching the complainant's testimony with evidence of the complainant's prior consensual sexual activity, which discouraged victims from testifying "because they knew their private lives [would] be cross-examined." House Legislative Analysis, SB 1207, July 18, 1974.

Inadmissible testimony barred by the rape-shield statute must reveal prior sexual conduct by the complainant. In People v Ivers, 459 Mich 320, 328; 587 NW 2d 10 (1998) the Court stated:

The proposed testimony . . . does not reveal any prior sexual activity by the complainant. The rape-shield statute acts as a bar to testimony regarding sexual subjects involving the complainant, unless such testimony falls outside the scope of the statute. The statute precludes admission of specified categories of evidence: "evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct . . . ." The evidence that the defense sought to introduce did not fall in any of those categories. See People v Hackett, 421 Mich 338, 356; 365 NW2d 120 (1984).

The procedure for evaluating evidence offered under Rule 404(a)(3), established in Hackett, requires weighing probative value against unfair prejudice or confusion under Rule 403. However, a degree of confusion is introduced by the rape-shield statute, which has a somewhat different balancing standard. While Rule 403 excludes relevant evidence only if "substantially" outweighed by factors such as unfair prejudice, confusion of the issues or misleading the jury, the rape-shield statute allows admission of the evidence in question only where "its inflammatory or prejudicial nature does not outweigh its probative value." MCL 750.520j(1). As noted in People v Adair, 452 Mich. 473, 481; 550 N.W.2d 505 (1996), "the rape-shield statute calls for exclusion when the probative value is merely outweighed by prejudicial considerations." However, the Court in Adair

endorsed the more restrictive approach of the rape-shield statute, 452 Mich. at 485, 550 N.W.2d at 511. See also People v Benton, 294 Mich App 191; 817 N.W.2d 599 (2011) applying it without even referring to Rule 404(a)(3), and expressly noting the statute's "significant modification" to the principle of Rule 403. 452 Mich. at 481; 365 N.W.2d at 509. This is inconsistent with the Court's approach in Hackett, which expressly applied the Rule 403 standard to the admission of evidence under the rape-shield statute. Hackett, 421 Mich. at 351; 365 N.W.2d at 126.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible. MRE 402. Under People v Brooks, 453 Mich 511, 517-519; 557 NW2d 106 (1996) the following principles determine relevancy:

In People v Mills, 450 Mich 61, 67-68; 537 NW2d 909 (1995), we explained that there are two separate questions this Court must answer to determine whether evidence is relevant:

First, we must determine the "materiality" of the evidence. In other words, we must determine whether the evidence was of consequence to the determination of the action. Second, we must determine the "probative force" of the evidence, or rather, whether the evidence makes a fact of consequence more or less probable than it would be without the evidence. 1 McCormick, Evidence (4th ed), § 185, p 773.

Materiality, under Rule 401, is the requirement that the proffered evidence be related to "any fact that is of consequence" to the action. "In other words, is the fact to be proven truly in issue?" Wade & Strom, Michigan Courtroom Evidence (rev ed), Rule 401, p 71. A fact that is "of consequence" to the action is a material fact. People v McKinney, 410 Mich 413, 418-419; 301 NW2d 824 (1981). "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the

evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." McCormick, *supra*, § 185, p 773.

However, materiality does not mean that the evidence must be directed at an element of a crime or an applicable defense. 1 Weinstein & Berger, *Evidence*, ¶¶ 401[01] to 401[03], pp 401-7 to 401-26. (See also comments to FRE 401, which is identical to MRE 401.) As stated by the United States Court of Appeals for the Sixth Circuit, in United States v Dunn, 805 F2d 1275 (CA 6, 1986), a material fact "need not be an element of a crime or cause of action or defense but it must, at least, be 'in issue' in the sense that it is within the range of litigated matters in controversy." *Id.* at 1281. See also Weinstein & Berger, *supra*, ¶ 401[03], p. 401-20.

In addition to determining the materiality of the evidence, we must also consider the principle of probative force. Probative force is the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Further, "any" tendency is sufficient probative force. MRE 401. This definition is well established in Michigan jurisprudence. See Beaubien v Cicotte, 12 Mich 459, 484 (1864), and Collins v Beecher, 45 Mich 436, 438; 8 NW 97 (1881).

The principles found in the early cases of Beaubien and Collins are amplified in the McCormick treatise, where the reader encounters the familiar formulation that "a brick is not a wall."

Under our system, molded by the tradition of jury trial and predominantly oral proof, a party offers his evidence not en masse, but item by item. An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not ever make that proposition appear more probable than not. Whether the entire body of one party's evidence is sufficient to go to the jury is one question. Whether a particular item of evidence is relevant to his case is quite another. It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable. Thus, the common objection that the inference for which the fact is offered "does not necessarily follow" is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet. A brick is not a wall. [1 McCormick, *Evidence* (4th ed), § 185, p 776.]

Criminal defendants possess a due process right to a fair trial that may be denied by improper evidentiary rulings. See US Const, Ams V, XIV; Const 1963, art 1, § 20. See also Walker v Engle, 703 F2d 959, 962-963 (CA 6, 1983). Evidence regarding a lack of prior sexual activity by the victim,

so as to prove that the victim would not consent because she had never done so previously, is barred by MRE 404(a)(3) as evidence of the victim's "past sexual conduct". Evidence of virginity of the complainant is likewise prohibited because it is also evidence of lack of past sexual conduct. People v Bone, 230 Mich App 699; 584 NW2d 760 (1998). Although Bone involved consent and this case involves a fourteen year old complainant who cannot give consent, the same principle applies.

A primary reason for the rape shield statute is the recognition that a complainant's sexual history is largely irrelevant "character" evidence which is unfairly prejudicial because it tends to appeal to outdated notions of the complainant's "worthiness" of protection under sexual assault laws. See People v Hackett, 421 Mich 338, 347-348; 365 NW2d 120 (1984); People v Arenda, 416 Mich 1; 330 NW2d 814 (1982). Courts generally recognize that the focus of a sexual assault trial should not be the character of the complainant but whether the defendant committed the criminal acts charged. People v Stull, 127 Mich App 14; 338 NW2d 403 (1983). Here, the trial court's decision will inject argument which run rough-shod over that concept by allowing the prosecution to unfairly appeal to the jurors' sense that complainant should be believed and that she is deserving of additional sympathy because is no longer chaste and because she has undergone an abortion.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellee LOVELL CHARLES SHARPE prays this Honorable Court affirm the decision of the court denying admission of evidence that complainant was previously a virgin and that she subsequently had an abortion.

/s/ Jonathan B.D. Simon  
JONATHAN B.D. SIMON (P35596)  
Attorney for Defendant-Appellee  
P.O. Box 2373  
Birmingham, Michigan 48012-2373  
(248) 433-1980

Dated: October 6, 2016